Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	
	)	
Accelerating Wireline Broadband Deployment by	)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment	)	

REPLY COMMENTS OF THE CITY OF NEW YORK

The City of New York (the "City" or "New York City") submits these reply comments in the above-captioned proceedings, in response to comments made in these proceedings by a few industry members and trade groups regarding the Notices of Inquiry included in each of the respective proceedings. The Notice of Inquiry included in WT Docket No.17-79 is hereinafter referred to as the "Wireless NOI" and the Notice of Inquiry included in WC Docket No.17-84 is hereinafter referred to as the "Wireline NOI".

Some industry comments in these proceedings have suggested that a number of municipalities do not sufficiently value the provision of broadband services in their communities. Although years ago, before wireless and wireline broadband service was as valued as it is today, it may have been that some local governments were reluctant to, for example, easily accommodate potentially intrusive wireless installations on private property. However, as wireless, and wireline, communications have taken an increasingly prominent role in American society, the City's experience, both in its own activities and in its discussions with a wide range of urban, suburban, rural and Native American communities around the country, has been that almost every local government throughout the U.S. is now committed to accommodating the infrastructure necessary to provide ubiquitous broadband services to their citizens. Where industry is willing to meet the fair, but inevitably diverse, needs of local communities with respect to broadband infrastructure installations, local requirements can be met, without the need for new federally-imposed regulations on local decision-making. The City has long worked with industry representatives to encourage wireless and wireline infrastructure investment here, but our cooperative efforts will only be slowed if the Commission were to adopt rules that purport to impose nationwide standards, inevitably ill-fitting in many circumstances, on local government decision-making regarding broadband infrastructure. Raised in the City's original comments in these proceedings, in the City's comments in WT Docket No. 16-421 (attached hereto as Appendix A), and in many other comments submitted by or on behalf of local governments in these proceedings and in Docket 16-421, were some of the deep, practical, real-life problems that would arise if the Commission were to try to impose centralized federal regulations on local government decision-making in this area. In these reply comments below, the City will identify a few of the legal misconstructions raised by some industry comments regarding the Commission's authority to adopt rules or rulings for which some industry participants have advocated in their comments.

The comments of Crown Castle International (at p. 28 and p. 54) in response to the Wireless NOI**,** cite the Supreme Court's decision in City of Arlington v. FCC, 133 S. Ct. 1863 (2013) ("Arlington") in support of FCC rulemaking authority over local government wireless facility siting decisions regarding local government owned right-of-way property. But Arlington does not support such authority. As Justice Scalia explained in his Arlington opinion:

> The dissent is correct that *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that…. Where

> Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.

Arlington 133 S. Ct. 1863 at 1874. Arlington relied on 47 USC Section 201(b) as the source of the Commission's rulemaking authority in that case (Arlington 133 S. Ct. 1863 at 1866)**.** 47 USC Sections 201(b) and 303(r) are both mentioned in Lightower Fiber Networks' comments (at page 8) in response to the Wireless NOI. Section 201(b), in its final sentence, authorizes rulemaking "as may be necessary in the public interest to carry out the provisions of this chapter". To the extent the "provisions of this chapter" constrain such authority, then 201(b) by its terms does not override such constraints – rulemaking inconsistent with such constraints would not be "carrying out the provisions" of the chapter. And 303(r) authorizes Commission rulemaking only if they are "not inconsistent with law". Neither 201(b) nor 303(r) override limitations on Commission authority contained in other sections of the Communications Act, a principle fully consistent with the Supreme Court's view in Arlington.

Thus, the applicable lesson of Arlington is not, as several industry comments in these proceedings would have it, that the Commission is authorized to make rules on anything it would like, but rather that the Commission is authorized to make rules only where Congress has not otherwise limited it from doing so. As described in the City's original comments in these proceedings, Congress (1) quite explicitly and intentionally barred the Commission, as the Commission itself has long recognized, from ruling on matters involving rights-of-way management and compensation (whether by adjudication or rule), (2) has expressly limited the Commission's authority with respect to 253(a) violations (when not otherwise barred because they implicate rights-of-way management or compensation) to adjudicative, not rulemaking, activity, and (3) explicitly limits Commission preemption authority under 332(c)(7)(B)(i)(I) and (II) to regulatory actions and not to other types of local decision-making such as the terms and conditions local governments decide to require for use of property such governments themselves own or manage, including right-of-way property.[1]

In the comments of the Telecommunications Industry Association (the "TIA") (pages 3-4), the TIA quotes the Fifth Circuit's decision in Arlington:

> "Although the legislative history surrounding the passage of § 332(c)(7) indicates Congress intended the provision to remove from the FCC the authority to make new rules limiting or affecting state and local government authority over wireless zoning decisions, the legislative history, like the statute itself, is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) *expressly imposes* [emphasis added] on state and local governments. In other words, the legislative history does no more than indicate Congress's intent to bar the FCC from imposing *additional* limitations on state and local government authority. It does not indicate a clear intent to bar FCC implementation of the limitations *already expressly provided for* in the statute. 668 F.3d at 253 [emphasis added by TIA]."

With respect to the issue of Commission authority over local rights-of-way and other local government owned or managed property, this quotation is on point. 332(c)(7)(B) does *not* "expressly impose" limitations on the rights of local government decision-making discretion when acting as property owner or manager, and thus the authority

[1] Rather relying on industry comments that inaptly cite the Arlington case as supporting Commission action where Congress clearly intended to bar it from acting, the Commission, in considering the Wireless NOI issues, would be better advised to look to the Supreme Court's Nixon decision (Nixon v. Missouri Municipal League 541 U.S. 125 (2004), recently followed by Tennessee v. FCC 832 F. 3d 597 (6th Cir. 2016)) which found that the Commission overreached its authority in preempting state governments from limiting their own municipalities from competing in the provision of telecommunications services. As the Court in Nixon found, Commission attempts to preempt a state government from constraining its own subordinate entities from taking a particular kind of action creates impossible paradoxes because a state always has alternative avenues of authority over the entities it has created and controls. The same sort of analysis applies to Commission attempts to preempt local government zoning and land use regulatory authority over property the local government itself owns or manages. As owner or manager, a local government is empowered to make decisions, in the same manner as a private property owner, regarding the use of such property that precede any question of zoning and land use regulation ever arising. Thus, Commission application of 332(c)(7)(B)(i)(I) and (II) preemption becomes as impossible to apply to local government-owned and managed property as 253(a) was to state-created and controlled local government activities in Nixon. And just as in Nixon the Supreme Court, both in its majority opinion and in Justice Scalia's concurrence, pointed to the absence of the necessary "clear statement" in the applicable statute to justify Commission preemption, so the absence of such "clear statement" in 332(c)(7)(B)(i) -- indeed, the clear statement is in fact to the contrary, given the reference therein to preemption of "regulation" there, as opposed to the protection from preemption of the broader "decisions" immediately prior in (c)(7(A) – mandates the conclusion that the Commission lacks current Congressional authority to preempt local decisions regarding use of property it owns or manages.

that the Arlington court recognized does *not* apply to 332(c)(7)(B) preemption with respect to the local rights-of-way or other local government owned or managed property.

The comments of CTIA in response to the Wireless NOI and the Wireline NOI also fail to provide convincing legal justification for the local government preemption steps CTIA urges the Commission to take. On page 13 of its comments, at footnote 34, CTIA cites three District Court opinions that it claims support the Commission's authority under 332(c)(7) to preempt local decision-making as to wireless antenna siting when the local government is acting in the role of owner or manager of the property location. But none of these cases support that concept.[2]

CTIA also claims (at page 14 of its comments) that the distinction between decisions regarding conditions a local government applies to the use of property it owns or manages on the one hand, and zoning decisions regarding the use of private property on the other, is not based on any language in the Act. That claim is unsupportable given the explicit distinction between the specific limitation in 332(c)(7)(B)(i) to the preemption of "regulation" (compared to references to "decisions" in 332(c)(7)(A) and "local legal requirements" in 253(a)). CTIA's comments dismiss the cases cited by the Florida Coalition of Local Governments in its comments in Docket 16-421 as irrelevant in this regard but in doing so coyly fail to cite Sprint Spectrum v. Mills 284 F. 3d 404 (2001) ("Mills") cited in the Florida Coalition comments, which is very much on point and was relied on by the Commission itself in its October 21, 2014 Report and Order (29 FCC Rcd 12865 at paragraph 239 and footnote 646). CTIA argues (CTIA comments at page 14) that decisions regarding the terms a local government applies to installation of wireless equipment on City-owned poles are "regulatory" in nature because "Any monies collected for lease of the poles goes into the municipal treasury." It is unclear where CTIA would have money from property rented by a local government go other than the municipal treasury.

CTIA further states misleadingly (at page 19 of its comments) that "In its 1997 *California Payphones Order* [12 FCC Rcd 14191], the Commission declared that a law 'may prohibit or have the effect of prohibiting' service, and thus violates Section 253(a), if it 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment'." In fact, that Order "declared" no such thing. The California Payphone Order, which describes the Commission's *refusal* to preempt the local requirements before it, nowhere remotely suggests that the test of whether a requirement violates Section 253(a) is whether it "'may prohibit or have the effect of prohibiting' service". No matter how many times this utterly unsupportable misreading of Section 253(a) is debunked, it appears industry representatives will keep trying to revive it. But that does not make it any less inaccurate and misleading. See the earlier ex parte comments of the City submitted in Docket No. 17-79. A legal requirement is subject to Section 253(a) preemption only if there is actual or effective prohibition, *not* if such requirement merely "may" (i.e., might, perhaps) prohibit or effectively prohibit telecommunications service. Although this distinction might to a casual observer seem trivial, it is very important to the matters raised in these NOIs. If an actual or effective prohibition needs to be shown in order to preempt a particular local regulation or legal requirement under 253(a), then a general rulemaking by the Commission that seeks to preempt all local regulations or legal requirements of a certain type regardless of the local circumstances would be beyond the scope of the Commission's authority (a conclusion further confirmed by the language of 253(d), which empowers the Commission to preempt legal requirements that violate 253(a) "to the extent necessary to correct such violation").

[2] In Sprint Spectrum L.P. v. Town of Durham, 1998 U.S. Dist. LEXIS 23941 (D.N.H. 1998), the town had previously, in its proprietary capacity, granted the wireless provider an option to use the property in question, conditional only on a separate zoning review approval by a separate zoning body. It was the denial of the zoning decision that was before the court. Similarly, in Crown Castle NG East, Inc. v. Town of Greenburgh, 2013 U.S. Dist. LEXIS 93699 (S.D.N.Y. 2013), the town's denial was based entirely on a zoning review under the town's generally applicable zoning law and the court's review was limited to evaluating the zoning criteria applied by the town, with the issue of the town's property rights not raised or considered. And NextG Networks of New York, Inc. v. City of New York, 2004 U.S. Dist. LEXIS 25063 (S.D.N.Y. 2004) was not a 332(c) case at all, but a 253 case, and the "proprietary" question was in any event rendered irrelevant by the court's decision that no 253(a) prohibition had been shown (furthermore, as the City noted in its original comments, 253(a) preemption is not properly applicable to wireless facility citing decisions at all, because 332(c)(7)(A) expressly limits preemption of local wireless facility siting decisions to 332(c)(7) itself, precluding 253(a) preemption with respect to all such decisions.

CTIA's advocacy (CTIA comments at pages 24-25) for the Commission to bar local governments from requiring the undergrounding of utility infrastructure in public rights-of-way demonstrates the extreme degree of CTIA's lack of respect for the important role that Congress guaranteed to local governments in the management of their own rights-of-way.[3] Congress in Section 253 did not merely require an actual prohibition or effective prohibition before 253(a) comes into play at all, it further provided that even if a local legal requirement does constitute such a prohibition or effective prohibition, preemption is still not available if the reason for such prohibition or effective prohibition is a management of rights-of-way matter. Rights-of-way management activity trumps, under 253(c) the prohibition/effective prohibition bar in 253(a). Would CTIA have the Commission believe that the same Congress that protected rights-of-way management with a safe harbor so clearly and carefully in 253(c) intended simultaneously to take such protection away uniquely with respect to wireless facilities siting in 332(c)(7), adopted at the same time, in the same statute, as 253(c)? That interpretation makes no logical sense. The interpretation that does make sense is that Congress did not intend for 332(c)(7)(B)(i)'s preemption regarding wireless facilities siting to apply to management of public rights-of-way activity, as is made clear by the language of 332(c)(7)(B)(i)'s reference to preempting only regulation (whereas 253(a) refers not only law and regulation but also to other legal requirements).

CTIA's effort (CTIA comments at p. 46) to distinguish non-rights-of-way property owned by local governments (as in Mills) from rights-of-way property is also unavailing. The U.S. Supreme Court was quite definitive on this question when presented with it long ago. City of St. Louis v. Western Union Tel. Co. 148 U.S. 92 (1893) makes clear that a city's rights to charge rent when a communications company installs facilities in public rights-of-way is the same as its rights to charge rent for a private entity's occupation of a space.[4] CTIA's comments (at page 32) claim that "…many courts have found that Section 253(c)'s 'fair and reasonable compensation' language limits permissible fees to those that are based on the locality's costs, and have invalidated revenues-based fees". Not one of the cases cited by CTIA invalidated a fee because it was a revenue-based fee.[5] If CTIA is distressed that the proper understanding of the Commission's statutory authority presents a limited protection for its members' interests, its recourse is to Congress, not to a misinterpretation of the applicable law.

The City will continue to eagerly participate cooperatively with the Commission and industry representatives on initiatives to share information and experience with other local governments to assist both them and the City in cultivating effective, voluntary practices that will advance an effort we all share – the continued expansion of robust, competitive, ubiquitous, innovative broadband services. Efforts instead to impose new, uniform rules on

[3] The City has required the undergrounding of utility lines in Manhattan and other areas of New York City for well over 100 years for important practical reasons that became apparent soon after modern urban utilities developed.

[4] "Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms….Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied…? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental." City of St. Louis v. Western Union Tel. Co. 148 U.S. 92 (1893) at 97, 99.

[5] The ordinance in question in PECO Energy Company v. Township of Haverford, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999) described no specific fee at all. There was no revenue-based fee at issue in Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081 (indeed the court indicated it was inclined to approve the fee in question there had the relevant ordinance not been invalidated on other grounds 146 F. Supp. 2d 1081 at 1101). In N.J. Payphone Ass'n Inc. v. Town of West York, 130 F. Supp. 2d 631 (D.N.J. 2001), the court specifically stated that it did not need to decide the issue of whether revenue-based fees are valid because it invalidated the local government process on other grounds ("The Court need not choose between these competing views of 'fair and reasonable compensation' in this case." 130 F. Supp. 2d 631at 638). In Puerto Rico Tel. Co. v. Municipality of Guayanilla, 354 F. Supp. 2d 107 (D.P.R. 2005) the court in invalidating a particular fee because the municipality provided insufficient information regarding its basis specifically states "That is not to say that the Municipality can only recover its costs." 354 F. Supp. 2d 107 at 114. The dicta in all these cases about fees being unreasonable if they are not "based on the use of the rights-of-way" derives from an early Telecommunications Act case that was not referring at all to barring revenue-based fees or limiting fees to costs. AT&T Communications., Inc. v. City of Dallas 8 F. Supp. 2d 582 (N.D. Tex. 1998). In that case the court was troubled not by a revenue-based fee but by a revenue-based fee to the extent it included in its revenue calculation revenue from sources other than the activities conducted using the infrastructure in the rights-of-way, indeed from all AT&T's activities in the city of Dallas. 8 F. Supp. 2d 582 at 583. That is a very long way from a conclusion that, in CTIA's words, "many courts have invalidated revenue-based fees".

local governments who face a wide variety of conditions will only make that effort more difficult, less creative and more contentious.

Sincerely,

The City of New York

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APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF THE CITY OF NEW YORK

The New York City Department of Information Technology and Telecommunications ("DoITT") submits these comments on behalf of the City of New York ("the City", or "New York City") in connection with the proceeding listed above. The City, as a large population center and technology, cultural, and business hub, is committed to encouraging deployment of new technology and looks forward to advances its citizens will reap from small cell/DAS facilities. However, the City does not believe that the deployment of this equipment necessitates disruptive new rules that will impact the City's successful system of franchise agreements. As discussed below, the City believes that municipalities are in the best position to protect the public's interest in safety and aesthetics, and that limiting municipalities' ability to charge market-based compensation for the use of poletops would significantly distort market prices. Additionally, the City notes that the Commission's authority to act in this area is constrained by Congress.

A. Introduction.

In its Public Notice in this proceeding[1] ("the Notice"), the Commission highlights New York City's existing franchise system for installation of small cell/DAS facilities, a system the City has had in place now for over twelve years, with eight current franchises and over 2,480 small cell/DAS facilities installed on poles in the City's streets. The Notice recognizes the City's poletop franchise system as featuring a "relatively low fee structure and a streamlined process for review of small wireless facility applications" on street light poles, traffic light poles, and utility poles located in

[1] Public Notice, *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Federal Communications Commission, WT Docket No. 16-421 (rel. Dec. 22, 2016).

the public rights-of-way. The Notice acknowledges the City's poletop franchise approach as a form of master agreement for access to structures in the public rights-of-way that expedites the attachment of small cell wireless facilities to city-owned infrastructure. The City appreciates the Commission's recognition in the Notice of the City's approach as one that appears to be viewed as a successful effort to manage the complex balance that the Commission identifies in facilitating the availability of robust wireless service while also assuring that vital local interests are protected. We hope the Commission will recognize the City's comments below as arising from the City's extensive and successful experience working with a broad range of wireless facilities providers over many years in this arena.

B. The City's Poletop Franchises.

The Notice correctly identifies the City's mechanism for authorizing and managing small cell facility installations in local rights-of-way as a set of franchise contracts entered into with various wireless facilities and service providers. These franchise agreements, eight of which are currently active, have been carefully drafted and negotiated with providers to ensure that critical public concerns are protected. Important public priorities that the City's poletop franchises protect include the following:

(1) Compatibility with the City's operational needs regarding the street lighting and traffic light activities that represent the primary intended use of the City's poles. Street light poles and traffic light poles were built to provide street lighting and traffic control, and the priority of those purposes must be preserved and protected. Wireless users under the City's franchises are required to operate on City poles in a manner consistent with the City's primary operational needs. In this regard, the City's Department of Information Technology and Telecommunications has worked, and continues to work, closely with the City's Department of Transportation and other relevant agencies to ensure that the supplemental use of these City poles as small cell locations does not conflict with, or burden, the original primary uses for these poles.

(2) Visual impact and public design requirements for these highly visible locations sitting directly on the City's streets and sidewalks. New York City's streets and sidewalks are among the busiest, most prominent and most visited in the world. The public design features of these streets are an important aspect of the City's management of its rights-of way. The City's Public Design Commission has jurisdiction over streetscape design review matters and has adopted detailed and specific design and size requirements for installations pursuant to the City's poletop franchises. 47 USC Sections 332(c)(7)(B) and 1455(a) include some constraints on local regulatory authority over the use of privately owned property for the siting of wireless facilities. But as the Commission has expressly recognized[2], such constraints apply only when local governments are exercising such regulatory authority. When the City makes aesthetic, design or visual impact judgments regarding

[2] Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting*, Federal Communications Commission 14-153 (rel. Oct. 21, 2014), paragraph 239, ("2014 Order").

property for which the City itself, rather than a private owner, is responsible as owner or manager, the City is not exercising regulatory authority over private land use, but rather is exercising its authority as a property owner or manager.[3]

New York City's streetscape is a unique and precious resource. Preserving the City's authority to manage that resource, including the authority to determine the aesthetics and visual impact of the City's street light poles and traffic light poles, to the same degree a private owner may control esthetic decisions regarding its own property, is of the utmost concern.[4]

(3) Arising directly from the important priorities raised in the preceding paragraphs (1) and (2), the City's limit of one wireless installation per pole has been essential to the implementation of the City's entire poletop franchise contract system. In order to oversee the operation of its street lighting and traffic lighting operations, in a manner that can effectively and efficiently co-exist with wireless industry installations, the City must ensure that as operational issues arise affecting critical City traffic and lighting activities, responsibilities can be identified without dispute among multiple wireless occupants. For example, if there appears to be an antenna malfunction affecting a traffic signal, the City needs to be able to identify immediately the source of the issue, without trying to determine which of multiple antenna providers on a pole is the source. In addition, the prospect of multiple competing entities engaged in maintenance of wireless facilities on traffic light and street light poles would increase the burden on the City, its contractors and suppliers to conduct their own operations to maintain traffic safety and street lighting.

Furthermore, the City's streetscape design and sidewalk visual impact concerns are not compatible with multiple installations on a single pole. The City's poletop franchise system includes a methodology for allocating poles such that competing companies have access to numerous pole locations without the need for multiple installations on a single pole. Absent the authority to limit occupancy to one installation per pole, the City would not have permitted such occupation at all,

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[3] As the City stated in reply comments to the Commission in an earlier proceeding (Reply Comments of the City of New York, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance,* WT Docket No. 08-165, October 14, 2008) responding to arguments by a wireless facilities provider similar to some made by Mobilitie in its petition: "The location of antennas on private property involves two steps for an entity seeking to install an antenna: (1) negotiation…with the private property owner, who operates with no federal restrictions on its discretion to allow or not allow the placement of antennas on its property or the terms and conditions of such placement (including compensation for the use of the property), and (2) any necessary land use approval of the installation. When an entity…approaches local government for the use for antennas of property the local government owns or manages, the local government has both roles to play. To suggest that any standards or experience applicable to situations in which the local government role is limited to the second role should also apply to situations in which local government is exercising both roles, defies any legal or policy logic."

[4] On a related matter, the City notes its concern with the scope of the observation in the Notice that "Due to their size and placement, small cells may have less potential for aesthetic and other impacts than macro cells." Such may be the case in an "apples to apples" comparison with respect to a zoning review of a small cell to be located on private property compared to a zoning review of a macrocell to be located on private property. But this generalization risks eliding the fact that requests for small cell locations received in connection not with zoning review of private property locations, but with requests for placement in public space, while the equipment itself might be smaller, the location itself may be more prominent and visually intrusive given the public space location, as well as more numerous.

and would not recommend that other local governments authorize such occupation if multiple installations per pole are federally mandated merely because one installation has been permitted. The City's enforcement of its long-standing franchise contract requirement limiting wireless installations to one per pole, implemented in the City's property management role, not its zoning authority role over private property use, is consistent with 47 USC Section 1455(a) (Section 6409(a) of the Spectrum Act). See the Commission's determination at paragraph 239 of the 2014 Order: ". . . [W]e conclude that Section 6409(a) applies only to State and local governments in their role as land use regulators and does not apply to such entities acting in their proprietary capacities . . . . Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property and we find no basis for applying Section 6409(a) in those circumstances."

(4) Market-based compensation to City taxpayers for the private, profit-making occupation of City-owned property. The City's franchise compensation terms for the poletop franchises arise generally from a form of hybrid competitive process, intended to generate a fair market rental value to the City. When the City first crafted its request for proposals for poletop wireless franchises, the City reviewed information regarding then-prevailing rental rates charged around the City by private landlords for rooftop occupation by wireless facilities (a competitive market that offers substitutable opportunities to poletop use for wireless). The City recognized that the poletop wireless facilities would offer less flexibility per installation than most rooftop installations, and therefore focused on the lower end of the rooftop market range as a minimum per pole compensation rate. The City also set substantially lower minimums in areas of the City where historic telephone penetration rates were lower (which also reflected lower market rental values in such areas).

The City's franchise granting process was and remains non-exclusive (with, as noted, above, eight active franchises), such that a potential franchisee is not required to bid a per-pole compensation rent that would be the single highest among all bidders in order to gain exclusive access to the entire inventory of City poles. Instead, the City set minimum per-pole compensation rents for franchise proposals, and then asked proposers to bid higher if they wished to gain a higher priority in the subsequent selection of individual pole locations during the periodic selection processes. In effect, the City established a form of "draft pick selection" process for franchisees to select individual poles. Franchisees who bid, during the request for proposals process, and therefore now pay pursuant to their franchise contracts, a higher per-pole compensation rent, receive earlier opportunities to select a group of specific pole locations. The Notice observes that this approach to per-pole rental compensation has produced a "relatively low fee structure", consonant with the City's goal of encouraging a robust wireless infrastructure in New York City, while also assuring that City taxpayers receive a market-based compensation rent for the private, profit-making occupation of taxpayer-acquired and taxpayer-maintained property.

(5) Structuring the franchise system to offer a selection of pole locations to multiple franchisees is another City priority reflected in the poletop franchise contracts. As noted above, the City has

established a process by which competing franchises have periodic opportunities to each select a limited group of new pole locations (in priority order based on the per-pole compensation each franchise offered, and now pays) during the applicable franchise request for proposals process. There is a profound difference, perhaps not fully distinguished in the Notice, between the flow of applications that may come in to a local zoning or land use board for a proposed wireless installation on private property, and the manner in which applications may come to a local government for wireless installations on poles in the streets. Zoning/land use review applications are inherently queued by the prerequisite of an agreement between a private property owner and a wireless facility provider, which then triggers any necessary application for a local land use review. In contrast, any wireless facilities provider, or any number of wireless providers, seeking to locate equipment on poles in the right-of-way could request, at any time, an unlimited number of requests for use of an unlimited number of poles, creating a potential "race to the window" in the event of some sort of mandatory deadline for review of applications to use local government-owned property. Each local community has a different number and arrangement of poles, and the appropriate method and timing for handling such requests, in an orderly manner that is consistent with the goals of enhancing wireless infrastructure, competition and other local priorities, is highly dependent on local conditions. It would be counter-productive to the Commission's goals to somehow attempt to create or apply uniform standards, requirements or deadlines for local governments to handle or evaluate requests for use of poles in the right-of-way.[5]

C. General Legal and Policy Issues.

(1) The City emphasizes that any action by the Commission in this proceeding that is applied to the use of local government property, such as the poles in New York City streets, that is also not similarly applied to private property that wireless facilities providers would seek to use would represent a serious distortion, not a promotion of free market incentives, and would discourage, not encourage, technological innovation.

The City has been working with small wireless facilities providers, using a wide range of technologies, for the use of City poles as facilities locations, for more than twenty years. As early as the mid-1990s, the City was working with innovative private sector companies such as Metricom, Inc., with its early wireless Internet access system "Ricochet", and the FCC's pioneer preference licensee Omnipoint, to place early forms of small wireless facilities on City poles. The City's experience with these early innovators, and many others we have worked with over the years, has made clear the highly dynamic and flexible nature of wireless technology options. Providers have used and will continue to use a highly diverse and ever-changing variety of methods

[5] The City's current franchise contracts are expected to expire in June, 2019. It is expected that the terms and conditions of contracts that would be applicable after that date may vary somewhat from the current terms and conditions, based on the ongoing experience and goals of the City and current and potential franchisees.

to offer wireless services.[6] Providers face competitive pressure to innovate in order to develop systems and equipment that most efficiently use any potential available resources. However, if the Commission were to select one type of potential location, such as poles in public rights-of-way, and by regulatory fiat set prices, terms, or conditions on accessing such locations, without also applying the same standards to private property owners, the Commission would be tipping the market toward a particular type of wireless technology, and a particular type of location, as well reducing incentives to use such a resource most efficiently.

To access private property for wireless systems, providers must negotiate market prices, terms and conditions with private property owners who are unfettered in their discretion regarding access to their properties. Providers are incentivized to develop and use the most efficient systems and technologies to minimize the need for such resources. If in contrast, local governments are limited from exercising the same scope of authority with respect to the sites they own and manage, as private property owners and managers do with respect to their sites, wireless entities will be artificially steered toward this particular resource, to use it inefficiently, and to reduce investment in technological innovation that use alternative sources. The City encourages the Commission not to try to impose limits on local government discretion with respect to the use of poles in public rights-of-way that it does not also impose on private property owners whose property wireless providers seek to access.

(2) The City observes that any attempt by the Commission to issue binding determinations pursuant to 47 USC Section 253 that would preempt local management of rights-of-way authority, including matters related to the placement of small cells on poles located in such right-of-way, would be beyond the scope of the Commission's statutory authority.

First, Section 253(d), which is the statutory basis for the Commission's preemption authority under Section 253, authorizes only case-by-case action, not action by general rule because it authorizes preemption only to the extent necessary to correct the applicable violation or inconsistency.

The City's experience provides a useful example in this respect. In New York City, Mobilitie in 2007 first acquired, from the original franchisee, the franchisee's rights to one of our existing poletop franchises, presumably concluding that its terms would not be prohibitive or effectively prohibitive. Under this franchise, Mobilitie pays the City over $100,000 a year as a base amount, and in addition is renting hundreds of pole locations, including several hundred of them with a recurring fee of over $2,700 per pole per year. Then, just last year, Mobilitie acquired franchisee's rights to yet a second City poletop franchise, giving Mobilitie access to yet additional poles. And this year, Mobilitie notified the City that it would be exercising its option under this second franchise to expand the area where it will be permitted to access poles, to an area where the recurring per pole fee will be over $3,000 per year, in addition to an increase in the base amount

[6] Although the Notice refers to several predictions about the future need for small cell facility locations, experience suggests that predicting the future of wireless technology is hazardous at best.

it will pay. None of these actions seem consistent with a position that the City's franchise terms are prohibiting or effectively prohibiting Mobilitie or its clientele from providing service in the City (particularly given that the City's poletop franchise system is applicable to all City poletop antenna users, both Mobilitie and its competitors, and thus certainly cannot be said to inhibit or limit "the ability of any competitor or potential competitor to compete in a fair and balanced" environment). Indeed, Mobilitie seems to be interested in obtaining the rights to an increasing number of poles on the compensation rates, terms and conditions in the existing franchises, including compensation rates that are not based on "costs" (despite Mobilitie's claim in its petition that a limit to "cost"-based compensation is necessary), are recurring, and include both a base rate and a per-pole-rate. If the Commission were, as Mobilitie is requesting, to issue a declaratory ruling that would have the effect of preempting the City's compensation rate terms, such would directly contradict Section 253(d)'s requirement that Commission preemption be limited "to the extent necessary to correct" a "violation or inconsistency".

In the same vein, although Mobilitie emphasizes in its petition the supposed need for broad (indeed, overbroad) relief from the Commission, just a few months before it filed its petition, Mobilitie was characterizing its relationship with local governments on siting small cells in much more positive terms. The following language is from a Mobilitie press release dated June 22, 2016, quoting Gary Jabara, CEO of Mobilitie, speaking before an investment group: "'Our close cooperation with local authorities has allowed us to navigate bureaucratic processes and help service providers bring greater connectivity to communities across the country more quickly than ever before.'. . . "'I am very bullish on Sprint and T-Mobile and believe that their network investment strategies will be a fairly immediate win-win for the company, cities that want to explore new IoT-driven connected city applications and individuals who want unfettered access to fast and reliable wireless service," Jabara continued. "We have built thousands of sites and have thousands of approved permits in hand and we don't see this slowing anytime soon.'"[7] In light of actual experience, the kind of declaratory ruling that Mobilitie seeks in its petition cannot possibly meet the "to the extent necessary" test of 253(d).[8]

Secondly, it is not a coincidence that despite many lawsuits regarding the scope of 47 USC Section 253 that have arisen over the past twenty years (though more in the early years after the 1996 Act), the Commission has never acted conclusively on any Section 253 matter implicating local rights-

[7] http://www.prnewswire.com/news-releases/mobilitie-ceo-gary-jabara-talks-small-cell-market-momentum-at-2016-wells-fargo-convergence--connectivity-symposium-300289122.html

[8] Further to the matter of the reliability of portions of Mobilitie's petition, see Mobilitie's odd footnote 23, where it claims that "franchise fees are "typically" paid only for exclusive franchise rights. Even the most cursory familiarity with the federal treatment of communications franchises and franchise fees should recognize that every cable television operator in the country is required by federal law to obtain a franchise for the use of the public rights-of-way (47 USC Section 541(b)(1)), that such franchises are by federal law non-exclusive (47 USC Section 541(a)(1)), and that federal law expressly contemplates recurring, percentage of revenue-based franchise fees payable by the franchisees under these non-exclusive franchises (47 USC Section 542(b)).

of-way management or compensation.[9] Section 253(d) conspicuously omits Section 253(c) from its description of matters that are subject of Commission preemption, and the legislative background is clear that Congress intended that the courts, and not the Commission, have jurisdiction over matters implicating local management of rights-of-way.[10] For Mobilitie to ask the Commission to rule on what constitutes "fair and reasonable compensation" under Section 253(c), or otherwise determine the scope of Section 253(c), is an especially egregious request that the Commission act squarely beyond the limits of its legislative authority as expressed in Section 253(d), limits the Commission has respected for many years.

(3) Even if the Commission had the authority to exercise preemption authority with respect to management of rights-of-way and compensation, Mobilitie's argument that "reasonable compensation" is limited to costs is not supported by the legislative history[11] or by the obvious comparison to the use of the term "just compensation" in Amendment V. to the U.S. Constitution. Under Mobilitie's argument about what "compensation" means, a private property owner subject to condemnation would be entitled not to the fair market value of the property taken, but rather to something like the private owner's transaction expenses in turning over its property to the government. Note, in this regard, that the City's poletops are a prominent, limited and valuable resource, just as private property is a limited and valuable resource, and if not used for wireless siting is potentially available for alternative public benefit and/or revenue-generating purposes, the value of which will vary widely from community to community and location to location, as with any property.

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[9] The Commission took action in a small number of individual disputes in the first months and years after the adoption of the 1996 Telecommunications Act where Section 253 issues were raised but none involved Section 253(a) preemption claims that raised Section 253(c) implications. *Classic Telephone* (*In the Matter of Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996)) involved local actions by two towns (under processes that had commenced before the enactment of the 1996 Act) to limit landline phone service in the community to a single company for communications policy reasons unrelated to rights-of-way. *California Payphone* (*In the Matter of California Payphone Ass'n,* 12 FCC Rcd 14191 (1997)) involved local exercise of delegated State authority under Section 253(b), and in *Troy* (*In the Matter of TCI Cablevision of Oakland Cnty, Inc*. 12 FCC Rcd. 21396 (1997)), while the Commission included some comments on Section 253, it carefully limited the basis for its decision to the Cable Act.

[10] Senator Gorton – the sponsor of the amendment that became the present version of Section 253(d) – explaining on the floor of the Senate that under his amendment: "in the case of these purely local matters dealing with rights of way [under section (c)], there will not be a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances. But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services—the very heart of this bill—then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill." Further, according to Senator Gorton, his amendment "retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts." 141 Cong. Rec. S8306 (daily ed. June 14, 1995)

[11] Reply Comments on NBP Public Notice 30 of the National Association of Telecommunications Officers and Advisors, et al., *A National Broadband Plan for Our Future* , Federal Communications Commission, GN Docket Nos. 09-47, 09-51, 09-137, (January 27, 2010) at pages 23-25 and Comments of the National Association of Telecommunications Officers and Advisors, *In the Matter of Level 3 Communications, LLC Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253*, Federal Communications Commission, Docket No. WC 09-153, (October 15, 2009) at page 12.

Furthermore, even if the Commission had the authority to exercise preemption authority with respect to 253(c) matters, and even if Mobilitie's proposed formula for "reasonable compensation" were appropriate for a landline occupancy of rights-of-way (Mobilitie's petition cites several Section 253 court cases in which a landline provider challenged local requirements for use of the rights-of-way, though even these do not stand for what Mobilitie seems to claim) it would be important not to conflate the role of public rights-of-way in the context of landline telecommunications services with the role of such rights-of-way in the context of wireless services. But as discussed above, wireless service implicates both greater actual and potential technological and locational substitutabilty for, and different kinds of impositions on, the rights-of-way, than does landline service. It would thus be inappropriate to apply arguments from a landline context to the of wireless antenna placement issues.[12]

(4) Lastly, with respect to access to poles, 47 USC Section 224 authorizes the Commission to promulgate rules allowing telecommunications service providers to attach equipment to poles "controlled by a utility" – but the statute expressly excludes States and local governments from the definition of a utility, yet another indication that the Commission is not authorized to engage in mandating telecommunications use of local government poles.

D. Conclusion.

The City has long been at the forefront of efforts to encourage the availability of competitive and innovative wireless communications services to its diverse community. Our recent project replacing outmoded payphone installations on the streets with newly designed links offering free wi-fi internet access service to the public, at no cost to taxpayers, is an example of the City's ongoing commitment to making communications services widely available with creative applications of technology. In its Notice, the Commission has recognized the City's efforts to advance and encourage the availability of commercial wireless services using City assets. Such local government assets can be a useful part of the larger national effort to facilitate wireless communications. But that can only happen if local governments are free to manage their properties in ways that reflect, as the City has done, local needs and conditions.

[12] Note also that Mobilitie's petition mischaracterizes the current state of the law as articulated by the federal judiciary regarding 253(c) preemption and regarding the interpretation of "reasonable compensation" even with respect to the landline context. The prevailing judicial approach to 253(c) preemption is expressed in *Level 3 Communications v. City of St. Louis* 477 F. 3d 528 (8th Cir. 2007), *cert. denied* 557 U.S. 935 (2009) and *Sprint Telephony PCS v. County of San Diego* 543 F. 3d 571 (9th Cir. 2008) *cert. denied* 557 U.S. 935 (2009), the latter of which overruled, in an *en banc* decision, an earlier Ninth Circuit decision (*City of Auburn v. Qwest* 260 F.3d 1160 (9th Cir. 2001)) that had, in the first years after the Telecommunications Act was adopted, provoked some confusion in the federal courts.

Respectfully,

/s/

The City of New York

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